NO. 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

SUPPLEMENTARY BRIEF FOR THE RESPONDENT
ON REARGUMENT

INDEX.

Page

ARGUMENT:

INTRODUCTORY 1

I. The Defense is not Available Under the Robinson-Patman Act, and Even a Fully Pleaded Violation of that Statute Cannot Under Repeated Decisions of this Court Bar Recovery of the Purchase Price; Any Other Rule Would Turn a Simple Debt Action into a Prolonged Antitrust Suit and Would Damage Commercial Credit. 4

1. The Robinson-Patman Act does not make any single sales transaction void 7

2. Under decisions of this Court the defense is not available as a matter of law 15

3. To allow the asserted defense would disrupt everyday buying and selling and impair ready extension of credit, particularly to smaller business enterprises 23

II. The Contentions Presented in the Brief Filed *Amicus Curiae* by the United States Are Without Validity 28

III. The Court Below Properly Ruled that on the Facts Developed in the Pretrial Procedure the Summary Entry of Judgment Pursuant to State Practice Must be Affirmed 31

CONCLUSION 40

CITATIONS.

CASES:

Arrow-Hart & Hegeman Electric Co. v. *Fed. Trade Comm'n*, 291 U. S. 587 (1934) 8

Elizabeth Arden Sales Corp. v. *Gus Blass Co.*, 150 F. (2d) 988 (C. C. A. 8th, 1945), cert. den. 66 Sup. Ct. 231 20

Bigelow v. *RKO Radio Pictures, Inc.*, 66 Sup. Ct. 574 (1946) 20

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909) 16

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927) 20

Fed. Trade Comm'n v. *Western Meat Co.*, 272 U. S. 554 (1926) 8

Fitch v. *Kentucky-Tennessee Light & Power Co.*, 136 F. (2d) 12 (C. C. A. 6th, 1943) 20

Page

Gross Bros. Flour Co. v. *International Milling Co.*, S. D. N. Y., June 7, 1944, F. C. H. Trade Reg. Serv., Par. 57,262 ..... 19, 29
International Business Machines Corp. v. *United States*, 298 U. S. 131, 137 (1936) 8
Edward Katzinger Co. v. *Chicago Metallic Co.*, Nos. 70-71, October Term, 1946 16
Loughran v. *Loughran*, 292 U. S. 228 15
McGregor v. *Westinghouse Electric & Mfg. Co.*, No. 28, October Term, 1946 16
Progress Corporation v. *Green*, 163 Misc. (N. Y.) 828 ..... 18, 29
Shaw's Inc. v. *Wilson-Jones Co.*, 105 F. (2d) 331, 333 (C. C. A. 3d, 1939) 9
Small Co. v. *Lamborn & Co.*, 267 U. S. 248 (1925) 18
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173 (1942) 16
Sorrentino v. *Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E. D. Pa.; 1942) 9
Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346, 355-56 (1922) 8
Story Parchment Co. v. *Patterson*, 282 U. S. 555, (1931) 20
United Shoe Mach. Co. v. *United States*, 258 U. S. 451, 460 (1922) 7, 8
United States v. *United Shoe Mach. Co.*, 247 U. S. 32 (1918) 7
Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U. S. 165 (1915) 18, 29

MISCELLANEOUS:

Attorney General Opinion, Dec. 28, 1936, 38 Ops. A. G. 539 12
Beckman, "Credits and Collections in Theory and Practice" (1938), pp. 6-7 25
80 Cong. Rec. p. 9559, June 15, 1936 11
H. Rep. 1480, 79th Cong., 2d Sess., Jan. 21, 1946 8
H. Rep. 1820, 79th Cong., 2d Sess., Mar. 26, 1946 8
H. Hearings on H. R. 8442, 74th Cong., 1st Sess., p. 24 12
Hearings on H. R. 2357, 79th Cong., 1st Sess., May 23, 1945 8
Henderson, "The Federal Trade Commission" (1924) c. 1, p. 24 8
Irons, "Commercial Credit and Collection Practice" (1942), pp. 94 et seq. 25
Legis. Note, 50 Harv. L. Rev. 106 (1936) 11
Prendergast & Steiner, "Credit and Its Uses" (1931), p. 10 26
S. Rep. 698, 63rd Cong., 2d Sess., p. 1 7
Slichter, "Modern Economic Society" (1931), p. 243 26
Wheeler-Lea Act of Mar. 21, 1938, c. 49, 52 Stat. 111 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 27.

BRUCE'S JUICES, INC., *Petitioner,*

v.

AMERICAN CAN COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

SUPPLEMENTARY BRIEF FOR THE RESPONDENT ON REARGUMENT.

The broad scope of the petitioner's, Bruce's, claims, both in its petition and in its main brief on the merits, seemed to require the particularized and detailed answers made by the respondent, American, in its main brief. The developments on the oral argument indicated that the issues involved were actually much narrower in scope. Because of this, we believe that it may be helpful to the Court to re-state these narrower and controlling issues and thus to clarify the argument. This brief, is, therefore, submitted on reargument as supplementary to respondent's original brief.

INTRODUCTORY.

Bruce's position is this: From 1936 through 1942 it purchased many hundred thousand dollars worth of

cans from American. For some of these it paid cash; for others it paid part in cash and part in notes. At Bruce's repeated request, the notes were continuously extended; from time to time some of them were paid in whole or in part by Bruce or by the crediting of annual refunds by American; from time to time various notes were consolidated in aggregated renewal notes; and, eventually, the remaining indebtedness was consolidated in the four renewal notes amounting to approximately $114,000 involved in the two suits here consolidated.

When sued in 1942 Bruce pleaded that the four renewal notes were wholly void.[1] This defense was based on the allegation that throughout the six-year period from June 1936 to 1942, American had sold at discriminatory prices to other customers. The most serious of these charges was that American throughout the six-year period used a uniform quantity discount system under which customers were classified and discounts determined according to total annual volume of purchases. This Bruce alleged was in violation of the Robinson-Patman Act and rendered the notes void.

There are thus but two issues presented by the present record. The first we believe is of major importance. It is likewise simple. Can a purchaser of goods on credit, who has used them but refuses to pay for them, set up as a defense that the seller charged, in separate sales to third parties, prices different than those

[1] Eight of the ten pleas in Bruce's answer assert that "The consideration for said note(s) is illegal and said note(s) [are] *void* and of no force and effect." (See R. 4-13, 41-46). Two of the pleas asserted a further defense of conditional delivery. On this defense the lower court specifically found against Bruce (R. 581-582), and it is not urged in this Court.

charged him? If so, a simple action for recovery on a debt is converted into a complicated, costly, and prolonged anti-trust proceeding.

This is the first and a controlling issue tendered by this record. Bruce asserts that the statute must be interpreted to mean that because American sold to others at lower prices during the period in which its debt arose,[2] the sales to it are "prima facie illegal" under the Robinson-Patman Act. This it says is a complete defense because the alleged violation makes the sales transaction void. Thus irrespective of injury to it, it need not pay its debt.

We submit that this argument distorts the statute. Violation lies not in *any single sale* but in two or more sales to different people which together have particular effects upon competition. These required effects on competition were carefully specified by Congress—and simply selling one man at a higher price than another is not of itself a discrimination, let alone a violation of the Act. The prohibited effects must also be proved.

Even where a complete violation of the Robinson-Patman Act is properly pleaded—that is, price differences, in two or more different transactions, with discriminatory results, and the requisite effect upon competition—we submit that under settled decisions of this Court, and everywhere followed, these allegations cannot be pleaded as a defense in a suit to collect the price of the goods sold. The wisdom of this settled rule

[2] As pointed out, *infra* pp. 33-36, Bruce in the present case cannot tie up any sales transaction with the renewal notes sued on. No single sale is identified. Bruce's position is simply that the "prima facie" illegality alleged as to some transactions renders these notes wholly void even though they are the merged remaining unpaid balance on at least six years' purchases.

is vividly seen in this case. Any other rule will impair the ready granting of credit to all types of business enterprises both large and small.

The second issue presented by the record is whether, assuming that a violation of the Robinson-Patman Act may be pleaded to avoid an admitted debt, Bruce made out enough of a case in the pretrial proceeding to warrant the prolonged trial necessary. Under Florida practice, as applied by its Supreme Court, its failure to do so was held sufficient to warrant summary judgment. We think it clear that an examination of the 625 pages of this record, and the exhibits which separately accompany it, shows that the judgment of the lower court was right and must be affirmed.

I. THE DEFENSE IS NOT AVAILABLE UNDER THE ROBINSON-PATMAN ACT, AND EVEN A FULLY PLEADED VIOLATION OF THAT STATUTE CANNOT UNDER REPEATED DECISIONS OF THIS COURT BAR RECOVERY OF THE PURCHASE PRICE: ANY OTHER RULE WOULD TURN A SIMPLE DEBT ACTION INTO A PROLONGED ANTITRUST SUIT AND WOULD DAMAGE COMMERCIAL CREDIT.

The simple way to focus on the key issue—whether this novel defense is to be allowed—is to examine the pleas entered by Bruce when sued on the notes. (R. 4-13, 41-46.) The two declarations, consolidated in this case, recite the notes, the second one stating in detail the series of renewals, and that the indebtedness "was created prior to February 1st, 1940." (R. 1-2, 39-40.) Bruce did not deny that it purchased the cans, that it used them, or that the amount due was correct and unpaid. Instead, it filed ten lengthy, general pleas in one suit, and six in another. To illustrate: Bruce pleaded that the notes were given "*as part* of a transaction involving the sale of cans" and "*evidenced* the purchase price of said cans."[3] The transaction, it continues, was

[3] Except where otherwise noted, italics have been supplied.

"unlawful" because American "*directly and indirectly* discriminated in prices." The discrimination is specified merely by repeating the language of the statute. The plea concludes, "*therefore*, the *consideration* for said notes is *illegal* and said *notes void* and of no force and effect." (R. 4-5.)

In the second suit, after there had been a demurrer entered in the first and a motion made for compulsory amendment—both pointing to the inherent vagueness of these pleas—Bruce sought to particularize: It "alleges more particularly" that the sales to others by American were "from June 19, 1936, and continuously through and after February 1, 1940." (R. 41) It names the other purchasers as two canners in Texas, three companies operating nationwide, a company in Indiana, a large grocery chain, and a pineapple canner in Hawaii. (R. 46.) Bruce alleges that American sold to these customers—within the vague period stated—

> "at *lower prices* . . . [than those charged Bruce] during the *same period of time, the exact price, or prices*, at *which said cans were sold* to said purchasers and *the method* by which said prices were fixed and *the precise terms* of such sales to such other purchasers *being unknown* to the Defendant but known to the Plaintiff . . ." (R. 42.)

The same approach runs through the remaining pleas in both suits. For example, after claiming discrimination in furnishing closing machines—a charge which later collapsed—Bruce particularizes that

> "other facilities and services which were so furnished, and *the manner* in which they were furnished, and the *precise terms* on which any were furnished, *are unknown* to Defendant but known to the Plaintiff . . ." (R. 43.)

Of such material are the pleas here involved. On this basis the Court must determine whether the Robinson-Patman Act requires that any simple suit by a seller for the price of goods sold on credit (and consumed) can be turned by such pleas into a backhanded, comprehensive and costly inquiry under the Act into the seller's entire business operations.

Bruce's argument rests on the assumption that where a seller over a "period of time" sells to others at a lower price than he sells or has sold to one buyer, the transactions if in violation of the Robinson-Patman Act are *void*, and there can be no recovery of the entire purchase price.[4] (As will be seen this is wholly unfounded.) Bruce next states that where agreements are in themselves illegal under the Sherman Act, this Court has refused to permit their enforcement by either party. Since the Sherman Act is an "antitrust" law, and the Robinson-Patman Act an amendment of the Clayton Act, also an "antitrust" law, Bruce urges that the same rule of voidness and unenforceability must be applied. To buttress this broad syllogism, the argument is made that neither Government civil or criminal antitrust proceedings, nor treble damage suits, nor even the enforcement activities of the Federal Trade Commission are effective. Hence, it is concluded, the type of inverted proceeding here presented must be permitted to emerge in any ordinary lawsuit to collect the price of goods sold.

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[4] As we point out in our main brief (pp. 12-14), Bruce struggles vainly to avoid the full impact of its own argument: If the Robinson-Patman Act makes the sale to Bruce at a higher price wholly void, there can be neither recovery on the sales contract nor on any *quantum valebant* or fair value basis. (See cases cited, Respondent's Brief, p. 14).

We submit that this argument misreads the statute, that it misapplies decisions of this Court, and that if accepted it will not only widely disrupt many types of daily buying and selling of goods, but will also seriously impair the extension of credit to the smaller business enterprises which the Act was designed to protect.

1. THE ROBINSON-PATMAN ACT DOES NOT MAKE ANY SINGLE SALES TRANSACTION VOID.

In determining its meaning, the text and legislative history of a Congressional enactment warrant examination. One cannot, as Bruce insists, blur fifty years of legislative development by broadly asserting that, "The Sherman, the Clayton, and the Robinson-Patman Acts are alike in kind, in intent, in the actions they outlaw" (Pet. Brief, p. 23). Elaborate argument is unnecessary to demonstrate the fallacy of this contention. The Robinson-Patman Act was not simply a spelling out in detail of what was forbidden alike at common law and under the Sherman Act.

On its face, Bruce's argument seems to fall apart. We might even grant, *arguendo*, that the Sherman Act merely recited the common law rules against restraint of trade—a proposition which six decades of implementation by this Court make at least somewhat doubtful. But it is indisputable that the Clayton Act of 1914 was aimed at abuses that had not been originally embraced in the Sherman Act.[5] Congress had become

[5] In reporting the bill, the Senate Judiciary Committee in 1914 stated that it first made unlawful specific practices which "singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts . . . ." *S. Rep.* 698, 63rd Cong., 2d Sess., p. 1. Compare *United States* v. *United Shoe Mach. Co.*, 247 U. S. 32 (1918) and *United Shoe Mach. Co.* v. *United States*, 258

aware of these abuses largely as the result of judicial decisions. And it was a specific portion, Section 2, of the Clayton Act that the Robinson-Patman Act of 1936 was enacted to expand.[6]

The Robinson-Patman Act deals with the *relationship* between two or more sales. If there is but one sale, the statute has no application. This is the cardinal difference between it and the Sherman Act which makes unlawful any *single* contract in restraint of trade. An understanding of this difference dissolves efforts to urge that the Patman Act makes any one sales transaction void.

If *S* sells a hundred units of a commodity to Jones on Monday for $100, that transaction is untouched by

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U. S. 451, 460 (1922), with respect to Section 3. See, also, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355-56 (1922); *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 137 (1936). The process of specification continued after 1914, *e.g.*, in the Wheeler-Lea Act of Mar. 21, 1938, c. 49, 52 Stat. 111, which added "unfair or deceptive acts or practices" to Section 5 of the Federal Trade Commission Act. It is still progressing. See, *e.g.*, proposals to amend Sections 7 and 11 of the Clayton Act. Hearings on H. R. 2357, 79th Cong., 1st Sess., May 23, 1945; H. Rep. 1480, 79th Cong., 2d Sess., Jan. 21, 1946; H. Rep. 1820, 79th Cong., 2d Sess., Mar. 26, 1946. Cf. *Fed. Trade Comm'n.* v. *Western Meat Co.*, 272 U. S. 554 (1926); *Arrow-Hart & Hegeman Electric Co.* v. *Fed. Trade Comm'n.*, 291 U. S. 587 (1934). See also, Henderson, "The Federal Trade Commission" (1924) c. 1, p. 24.

[6] Bruce's attempt to assimilate the Robinson-Patman Act into the Sherman Act is perhaps best answered by its own brief. For after pointing out that in the Act Congress had foregone a "concrete definition of wrongs" in favor of a mere recital of "the common law rules against restraint" (Brief, p. 22), Bruce points out that in the Robinson-Patman Act price discriminations and their effects were "singled out for *legislative specification*" (*id.*, p. 24).

the Robinson-Patman Act. If *S* sells the same number to Brown on Wednesday, at the same price, neither the sale to Jones nor to Brown is in any way covered by the Act. On Thursday, *S* may sue either without concern.

If on Friday, however, *S* sells two hundred units of the same product to Smith for $90, there may be a violation of the Act if the price difference is "discriminatory" and if it has the specific unlawful effects prescribed in the Act. But only after the Friday sale can the two earlier sales have any relevance. Only their relationship is pertinent. No one of the three sales is in and of itself illegal.

The sale on Friday to Smith does not relate back and make the Monday sale to Jones *void*. Nor does it void the Wednesday sale to Brown. Both were proper on Thursday and *S* could sue for his price on that day. Thus no single transaction can be isolated by itself or called void. This was nowhere better stated than by Bruce's counsel in the pretrial proceedings in this case:

> "*Mr. Fowler:* I respectfully point out that it takes three persons and at least two transactions to violate the Robinson-Patman Act; and discrimination requires two sales . . ." (R. 175.)[7]

This illustration may be followed into Bruce's ultimate position in this case—that the existence of a quan-

[7] Thus where the seller refuses to sell one customer and sells his competitor, it has been held that no basis for violation can exist. A single sale cannot be illegal. "The discrimination in price . . . must be practised 'between different purchasers.' Therefore at least two purchases must have taken place." *Shaw's Inc.* v. *Wilson-Jones Co.*, 105 F. (2d) 331, 333 (C. C. A. 3d, 1939). See, also, *Sorrentino* v. *Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E. D. Pa., 1942).

tity discount, alleged to be unlawful, rendered all sales void.[7] *S* may well have had an illegal quantity discount in force when he sold to Jones on Monday and to Brown on Wednesday at the same dollar price. But unless and until he made a further sale on Thursday at a *lower price*, the Robinson-Patman Act could have no application. It is immaterial whether the lower price results from use of a discount schedule or is simply a price reduction.[8] Unless two transactions involving the same commodity sold under like circumstances with specific effects can be shown, the Act has no application. The individual sale cannot of itself be illegal. And the existence of a discount schedule or price list does not change this fundamental character of the Act.

Nor does it make any difference that Jones and Brown, instead of paying cash, gave their notes.[9] In short, what is prohibited by the Robinson-Patman Act is a specified unlawful effect arising out of the *relationship* between or among two or more sales. Violation is not in the sales transactions or in the effect of any one of them alone. It can be found only by comparing two or more transactions.[10]

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[8] Indeed, the existence of a price list or discount schedule is not of itself relevant because under the Act the *actual prices* charged, in two or more transactions are controlling no matter how arrived at.

[9] In the present case the sales to Bruce were by the contract terms originally to have been for cash. See Def. Exhibit 11. This was modified in part by the extension of a line of credit to Bruce. See R. 502-503.

[10] Consider the effect of Bruce's contention—that a later sale makes void an earlier one to a different buyer—upon the ordinary everyday sale of an article on the installment plan with security title retained by the seller until full payment: If at a later date the seller sells to another at a lower price, in violation of the Robin-

It is submitted that where the sales by *S* to Jones on Monday and to Brown on Wednesday are untouched by the Robinson-Patman Act, that a new rule which voids *ab initio* these sales because of a sale to Smith on Friday or to any person in the future can only cause confusion and uncertainty as to what is legal and what is a completed business transaction.

Further light is thrown on the fallacy of Bruce's contention that the sales to it are illegal and void if American violated the Patman Act in selling to others, by briefly examining what the statute requires for a violation when the relationship between the two groups of sales is scrutinized.

First, a mere difference in price is not enough. The difference must be a "discrimination." This means that the relationship among the various purchasers must be such that a lower price to one will concern the other.[11] Discrimination under the Act means more than a difference in price between purchasers; it means a difference in price where the attendant circumstances demand equal treatment. Legis. Note, 50 Harv. L. Rev. 106 (1936). For example, it has been officially

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son-Patman Act, and the first transaction is thus rendered illegal and void, and not entitled to judicial aid, is the seller not only to be denied the right to recover his price but also foreclosed from repossessing the article? On Bruce's theory of a *void* transaction, this must follow. See cases cited, main brief, p. 14. Wholly apart from the effect of the suggested interpretation upon installment selling, the Patman Act was never intended to work a forfeiture of this magnitude, or to upset widely established business methods.

[11] "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment . . ." Congressman Utterback, 80 Cong. Rec. p. 9559, June 15, 1936.

ruled that a seller may sell to the United States Government at a lower price than to others without running any risk of having made a "discrimination in price" under the Act. *Attorney General Opinion*, Dec. 28, 1936, 38 Ops. A. G. 539. Ordinarily, the two or more sales must be to purchasers who compete in the resale or use of the goods. Thus if the present defense is permitted in a suit for the purchase price, the issues immediately broaden into an inquiry into what each of the other purchasers besides Bruce made and sell. Does, for example, pineapple juice compete sufficiently with grapefruit juice to cause a violation? Does tomato juice compete sufficiently with other juices?

In this same connection, no discrimination exists despite differences in price if two sales are made at different times. This is true even though the seller maintains uniform discount schedules. A future sale does not have to be compared with a spot sale at a later date. See H. Hearings on H. R. 8442, 74th Cong., 1st Sess., p. 24. The goods must also be the same since only sales "of like grade and quality" need be compared; and the Act likewise exempts price differences where market conditions have changed, or seasonal factors intervened, or obsolescence has occurred, etc. Illegality in relationship cannot be found without inquiry into all of these matters insofar as they affect the various transactions. No single sale is void.

But paramount in controlling what is proper or made illegal in the relationship among sales, is the statutory specification of the *effects* which likewise must be found. These are fully set forth in our main brief, pp. 18-19. Not only is no single sale illegal; but even two sales at different prices which are discriminatory as between the purchases are not prohibited unless it can be shown

that they have a probable *substantial* effect upon competition.[12]

Sales at different prices under a uniform policy of customer classification have not in themselves been regarded as violative of the Robinson-Patman Act. Different prices may be justified on volume and accompanying differences in cost. The Federal Trade Commission, the agency primarily charged with the enforcement of the Robinson-Patman Act, has recognized group classification of customers for discount purposes. It has also recognized that the price differences do not need to be in precise mathematical relationship with the differences in cost in individual cases.[13]

This survey of the Act does more than point up the inadequacies of Bruce's pleas. It makes clear that the Robinson-Patman Act cannot be interpreted as rendering the sales to Bruce void. The statute attaches not to the sale or sales to it but to the relationship between them and sales to others. By themselves individual sales are neither inherently illegal nor directly touched

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[12] It is only at this point that it might be argued that a particular sale is touched by the Act. Subsection 2(f) [15 USC 13(f)] makes it unlawful "knowingly" to receive a "discrimination in price" in violation of the Act. Section 3 [15 USC 13a] makes criminally unlawful being a party to a transaction "which discriminates *to his knowledge* against competitors of the purchaser." Thus the buyer who gets the lower price in two or more transactions, and knows that the result will violate the Act, may be engaging in a wholly illegal transaction and relief will be denied him if the seller defaults. But under no conceivable interpretation of the statute can the sale to the innocent purchaser, who was charged the higher price and thus discriminated against, be deemed void. American could not have refused to deliver cans to Bruce.

[13] A fuller discussion of this point will be found in respondent's main brief. (pp. 42-45)

by the Act. And only where the comparison shows a "discrimination in price" which has the specified effects can a violation be found.

More than this, the text of the Act makes obvious what it might mean to permit a buyer, who has purchased and resold or consumed the goods, to raise such defense in a suit for the price. The single issue of money owed would turn into a proceeding of infinite complexity. It would necessitate inquiry, not into the relations between the seller-plaintiff and buyer-defendant, but into those between the seller and his other customers; into what these other customers did in their businesses and if or how they competed with the first buyer; into the time of the several sales, market conditions, and similarity or dissimilarity of goods; into the effect or lack of effect on competition.[14] And if, as Bruce asserts, the kind of pleas he has put in throws the burden on the seller to disprove violation, then the cost of legal collection from one to whom credit has been extended may far exceed the value of a debt.[15] To this point we shall return after demonstrating that under the repeated decisions of this Court the defense does not lie as a matter of law.

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[14] As Bruce states in its Reply Brief (p. 16): "Therefore if discrimination by a seller against a single customer is to be shown, there must of necessity be examination into the terms of sale to other customers. For that reason the law itself compels the inquiry to go beyond the transactions between seller and complaining customer."

[15] In one Federal Trade Commission case, the cost of preparation of accounting schedules to show lack of violation was stated to be in excess of $50,000. See *infra*, fn. 22.

2. UNDER DECISIONS OF THIS COURT THE DEFENSE IS NOT AVAILABLE AS A MATTER OF LAW

It has already been seen that under the Robinson-Patman Act, no individual sale and purchase of a commodity is rendered illegal. Only the relationship among sales—which gives rise to a "discrimination in price" having specified effects upon competition—constitutes a violation of law. This is wholly unlike the Sherman Act violation where the contract itself contains provisions in restraint of trade such as price fixing, production limitations, etc.

Writing for a unanimous Court in 1934, Mr. Justice Brandeis pointed out that

> "By *the long line of cases following Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, *it is settled* that *illegality constitutes no defense* when merely collateral to the cause of action sued on. A 'person does not become an outlaw and lose all rights by doing an illegal act.' " (*Loughran* v. *Loughran*, 292 U. S. 228.)[16]

This is not, as Bruce suggests, a mere matter of semantics or a play upon the word "collateral." The Court has consistently drawn the line between (1) a contract which is void because the illegality is found within the four corners of the contract itself and in what the defendant is obligated to do by that contract, and (2) a contract which is proper in itself but where the defendant charges that what the plaintiff is doing with others is unlawful. The typical case in the first group is that of a *patent license agreement* containing *price fixing clauses.* The licensee agrees to follow the

[16] The line of cases, holding that the vendee, when sued for the purchase price of goods cannot plead illegality not inherent in the specific sales contract, is reviewed in our main brief at pp. 22-24.

licensor's direction on resale prices. Or he agrees to restrict his production. These provisions of the contract itself are illegal on their face unless the patent is valid. Hence the licensee when sued, may plead that the patent is invalid and the contract is therefore void. *Cf. Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942)[17]. The second group is typified by the case at bar where the purchaser is sued for the price of goods. His contract is not illegal, but he alleges illegality arising out of what the seller does with other purchasers.

Bruce repeatedly seeks to avoid this settled rule by confusing the issue. It argues that American's stand-

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[17] In the *Sola* case, Chief Justice Stone made it clear that only inherent illegality in a sales contract itself could be a bar to recovery. Referring to a case where violation of the Sherman Act had been permitted as a plea to bar a suit for the purchase price, *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), he carefully pointed out that there the goods had been "purchased from an illegal combination *in pursuance of an illegal agreement, both in violation of the Sherman Act.*" (317 U. S. 177.)

It is also clear that the case at bar is unrelated to either the *McGregor* or *Katzinger* cases now pending. *McGregor* v. *Westinghouse Electric & Mfg. Co.*, No. 28, Oct. Term, 1946; *Edward Katzinger Co.* v. *Chicago Metallic Co.*, Nos. 70-71, Oct. Term, 1946. In these two cases, the license agreement contains price-fixing provisions. The licensor seeks to recover royalties or damages for infringement, but not to enforce the restrictive covenant. The issue is whether the price-fixing covenant *in the contract itself* renders the entire agreement illegal or is separable so as to permit enforcement of the royalty provision. The whole inquiry is within the four corners of the contract. The case at bar does not involve an illegal sales transaction in whole or in part. If any violation of law exists, it flows not from the sales to Bruce but from their possible relation to different sales to others under various marketing conditions which control legality.

ard sales contract contained a discount schedule which Bruce alleges is illegal. Accordingly, Bruce contends that the contract is in itself therefore illegal, and that the present case is analogous to the Sherman Act cases. This is demonstrably fallacious. If American made a particular size and style of can for Bruce alone—as it does for many customers—and never sold this can to others, there would never be two comparable transactions upon which to charge discrimination under the Patman Act. It would be immaterial what discount schedule was contained in the sales contract.[18] Or if the top discount brackets in the uniform contract were never utilized in selling cans to others, comparable to those sold to Bruce, the listing of those discounts in the standard sales contract is irrelevant under the Act.

The basic distinction between illegality arising out of two or more transactions between at least three different people, and illegality inherent in the contract between two people alone, may be seen in even a simpler manner. To prove a violation of the Sherman Act you need show only an agreement between A and

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[18] That Bruce is not unaware of the fundamental fallacy in its argument is shown by its Reply Brief, p. 15. Here it is driven to argue that there are no differences whatever in all types and sizes of containers, "regardless of what purpose for which used." In this effort to escape the decisions of this Court, Bruce writes out of the Patman Act the requirement that there must be "different purchasers of *commodities of like grade and quality*." This cannot apply to things which are wholly different to begin with: An oval can for sardines, a friction top can for salted peanuts, a can for lubricating oil or for tennis balls, and a can for aspirin—these are not the same in type or size or use or even the kind of metal from which made. They are not "commodities of like grade and quality" even though the same discount may be applied to the sale of each of them.

B containing a provision in unlawful restraint of trade. But to show violation of the Patman Act, you must show not only what was done in the transaction between A and B, but also in the other transaction between A and C, and what the joint effect of the two sales may have been. Alone neither can be illegal, and void, under the Robinson-Patman Act. And this is true even though a standard contract was used in both transactions.

No amount of dialectic should obscure this fundamental rule of law that unless the sales contract itself is void, the seller may recover his purchase price. *Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U. S. 165 (1915); *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248 (1925). It is not only the settled view of this Court under the Sherman Act. In the only two instances in which a purchaser has attempted to avoid payment of the price of goods by alleging a violation of the Robinson-Patman Act in sales to others, the courts have refused to allow the defense. The *Progress Corporation* case in the New York Supreme Court is set out in our main brief, p. 24. In the other case, in the Southern District Federal Court in New York, decided by Judge Leibell on June 7, 1944, the seller sued to recover the purchase price of flour. The buyer, as has Bruce in this case, brought a treble damage action against the seller alleging violation of the Robinson-Patman Act arising out of rebates to other purchasers. The buyer also attempted to plead these violations as a defense in the suit for the purchase price, and then moved to consolidate the cases on the ground that a common question was involved in both cases.

Judge Leibell pointed out that the charge that the Patman Act was violated in selling to others at lower prices did not void the sales to the defendant.

"The contracts on which International [the plaintiff seller] sues are not invalid under the antitrust laws. All that has been alleged is that they are collateral to a practice prohibited by the statutes. . . . There is, therefore, no common question of law or fact in the two actions. The motion to consolidate is accordingly denied." *Gross Bros. Flour Co.* v. *International Milling Co.*, S. D. N. Y., June 7, 1944, C. C. H. Trade Reg. Serv., Par. 57,262.

Thus not only have the decisions of this Court made it clear that only illegality contained in the contract itself will bar recovery, but in the only two cases found in which the attempt was made based on asserted violations of the Robinson-Patman Act, it was readily recognized that violation of that Act does not render any single sale void and cannot bar suit for the price of the goods.

Bruce seeks to avoid this settled law resting on sixty years of decision by urging that the rule should be changed where a buyer pleads a violation of the Robinson-Patman Act. It offers no support from the specific provisions of that Act. But after asserting that the sales to Bruce were *void*—a proposition which cannot stand—it urges that the Court must allow the defense in a suit to recover the price of goods in order to permit efficient enforcement of the Robinson-Patman Act.

This seems to us an unwarranted request for judicial legislation. We believe that the enforcement activities of the Federal Trade Commission and the Department of Justice are not ineffectual. We also believe that the treble damage action has proved to be in proper cases

an appropriate remedy.[19] Congress is the proper forum to change the law or to enact new laws for additional remedies. As above indicated, the contrary course suggested by Petitioner's interpretation of the Robinson-Patman Act turns a simple action for debt into a prolonged anti-trust action, and creates an additional remedy not contemplated by Congress. Further, this suggested remedy of not paying for goods bought and used is particularly objectionable, for it would inflict a penalty entirely unrelated to the damage done, if any.

This points up one of the key fallacies in Bruce's position. If, instead of seeking treble damages for alleged violations of the Robinson-Patman Act, a buyer can assert that the sales transaction is void and the price unrecoverable, the effect may be to make the penalty wholly unrelated to the violation. *S* may sell *B* a hundred thousand units at a dollar apiece, and sell *C*

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[19] For examples of successful treble damage actions under the Robinson Patman Act, see *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F. (2d) 12 (C. C. A. 6th, 1943); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. (2d) 988 (C. C. A. 8th, 1945), cert. den. 66 Sup. Ct. 231. And decisions of this Court have hardly made proof of damage a hazard. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 66 Sup. Ct. 574 (1946); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927); *Story Parchment Co.* v. *Patterson*, 282 U. S. 555 (1931).

And Bruce itself, in seeking this remedy filed a treble damage action in the Florida Federal District Court against American, predicated on these same transactions, shortly after American brought suit on the notes. *Bruce's Juices, Inc.* v. *American Can Co.*, No. 569, Civ. T., S. D. Fla., filed Oct. 2, 1942. This action was started before the amended pleas were filed on Nov. 6, 1942, in the first State court suit on the notes (R. 4), and long before the second note suit was filed on Jan. 22, 1943 (R. 39).

ten thousand units at 98 cents.[20] Assuming that this difference is a "discrimination" and that it is found to have a substantial effect upon competition between *B* and *C*, there is a violation of the Act. If *B* has suffered $10,000 damage, he may collect $30,000 and counsel fees as Congress has provided. But if the violation renders the sales to *B* void and the purchase price cannot be recovered, the penalty to *S* is $100,000. And since the lower price sales to *C* must also be void, *S* cannot recover from *C* either if he has been sold on credit. Thus against the $10,000 injury to *B*, a penalty of $109,800 results on Bruce's theory that the transactions are void. This would be in addition to the recovery in the treble damage suit.

As applied in the present case, the position taken by Bruce is even more extreme. Admittedly, neither the pleas nor the proof (*Vide infra*, pp. 33-36) offered in the pretrial proceeding tied the indebtedness represented by the notes to any particular sales transaction with Bruce, or related this indebtedness to any specific sale of like cans at any time to any competing packer. Eventually, it was clear that all that was pleaded, or offered to be proved, was that American had a quantity discount system in the six year period. This Bruce insists is sufficient to make out a *prima facie* case of illegality, and to make *every sale to Bruce and every other purchaser* during the six-year period legally *void*. To quote Bruce's argument, the quantity discount schedule "directly and inherently affected *every* transaction by petitioner [Bruce] out of which emerged the notes on which suit has been

[20] On Bruce's theory it is immaterial what quantity is sold to the other purchaser. And as noted, Bruce nowhere in its pleas alleged any specific injury or specific damage. See Respondent's Brief, pp. 6-7.

brought."[21] *Reply Brief*, p. 3. This is Bruce's ultimate position. And since every sale of such type and size of can sold to every other food packer during these six years was made subject to the same uniform schedule, Bruce's argument covers all.

The astonishing result of giving approval to this type of defense is thus clear: If the quantity discount schedule based on volume purchased could not be completely justified—whenever a buyer refused to pay for goods and interposed the requested defense—every sale would be *void*. Every other buyer could likewise refuse to pay. And the loss to the seller would be wholly unrelated to the size or any possible effect of the asserted discrimination. It would be the *full amount* of the purchase price in every sales transaction. For on the theory of the defense here asked to be recognized, every individual sale is *void*, and there can be no recovery.

We submit that nowhere is it remotely suggested in the Congressional consideration of the Act that such a forfeiture was contemplated when the expanded concepts of unlawful price discrimination were enacted in 1936. Even more compelling is the practical commercial effect which any such rule would have. To this we now turn.

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[21] As will be seen, Bruce goes further and even though it cannot relate the notes to particular sales or show any injury to it, Bruce urges that "no facts could be introduced" to justify a customer classification based on total volume purchased. See *infra* pp. 38, 39. The result urged is that a seller using a quantity discount system cannot collect for anything it has sold on credit. Irrespective of the measure of the alleged discrimination and apart from any competitive effect, the total purchase price on all sales is beyond recovery because every sales transaction is legally *void*.

3. TO ALLOW THE ASSERTED DEFENSE WOULD DISRUPT EVERY-DAY BUYING AND SELLING, AND IMPAIR READY EXTENSION OF CREDIT, PARTICULARLY TO SMALLER BUSINESS ENTERPRISES

It is paradoxical that allowance of the defense which Bruce asks for in the name of the small business man would have a drastic adverse effect upon smaller enterprises. This follows, without challenge, from the scope of the Robinson-Patman Act, from the extent to which the giving of short or long term mercantile credit to buyers is practiced both in selling raw materials and goods for resale, and from the obvious effects which would flow from permitting this defense in every suit to recover the purchase price. Even if the law were unsettled, these demonstrably undesirable results would seem to show that this could not have been intended by Congress and to require this Court to deny the asserted plea.

The Robinson-Patman Act is applicable throughout the whole of American industry. The prohibitions against price discrimination reach the sales by small as well as by large sellers; they apply to the sale of raw materials for manufacture, to the sale of the finished goods for resale both at wholesale and retail; they require scrutiny of spot sales and of future sales; they apply to sales for cash or on credit or on installment payments, to payment by trade acceptance, by bill of exchange, and by note. The prohibited effects are not measured merely by their substantial tendency to monopoly, but reach the narrower "lessening of competition" and the mere injury or prevention of competition among sellers, buyers, or the "customers of either of them." In short, any set of sales transactions by any interstate seller to any kind of buyer are here concerned.

If any time that a seller sues a buyer to recover the price of goods, which the buyer has accepted and con-

sumed or resold, the buyer with no other defense can plead a violation of the Robinson-Patman Act, it needs no legally expert person to appreciate the complexity and cost thus added to the legal collection of a business debt. A suit for the price of goods sold, or for the collection of notes given in payment in the extension of mercantile credit, is a simple garden variety of legal action. An antitrust proceeding is a wholly different thing. As we have seen, the scope of the issues raised reaches far beyond and behind the particular sale. They make it necessary to inquire into, to take depositions on, and to litigate the relation of the seller to many other customers. Prices, discounts, invoices on a multitude of sales are evidentiary; assembly of such material into practicable exhibits is essential; comparisons of goods, markets, methods, time of sale, costs of manufacture and delivery may have to be made. And if, as we have seen, from the pleas filed by Bruce, the alleging of price differences and violation merely in the words of the Act, is to be taken as *prima facie* sufficient, and as Bruce contends the burden is then on the seller to disprove violation, this costly burden can be cast on the seller in any suit for the purchase price.[22]

[22] These complexities and costs are well illustrated in the present case. Bruce asserts that the cost accounting studies made available to it were not sufficiently detailed and requested American to produce detailed invoices and books of account covering a large group of customers. Yet the record discloses that $5,000 was expended in getting together the material requested and furnished for one session during the pretrial proceedings in New York City (R. 102). It has been informally stated that the preparation of cost accounting studies necessitated the expenditure of several hundred thousand dollars in a recent Federal Trade Commission proceeding under the Robinson-Patman Act, where the cost justifications were ultimately deemed proper under the Act.

In most cases this means that the cost of collection will exceed the amount of the debt. More than this, allowing the requested defense will mean the likely freezing of all outstanding accounts. For if one buyer can allege and prove unlawful discrimination in sales to others, on the theory that it makes the individual sales transactions with him *void*, all others who have purchased would be well advised to withhold payment. For if the separate sales are legally void, these other purchasers cannot be made to pay. Even a seller confident that his operations can ultimately be proved proper, and most certainly all those whose operations might be challenged, are not going to risk these costs and complications when the obvious way out is *not to extend credit.*

That long and short term credit to buyers by sellers is the lifeblood of commerce needs little discussion. If most sales of goods for resale or consumption were made C. O. D. (or sight draft against documents), the commercial impact would be critical. See Beckman, "*Credits And Collections In Theory And Practice*" (1938), pp. 6-7; Irons, "*Commercial Credit And Collection Practice*" (1942), pp. 94 *et seq.* But to the smaller enterprise—the under-capitalized, the developing business, the temporarily overextended—mercantile credit is well nigh vital.[23] Such credit is often the only hope for small and new enterprises to prosper.

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[23] Insofar as retailing is concerned, "mercantile credit makes the neighborhood store possible by enabling its owner to overcome financial limitations. Without this intimate financial aid, men with limited capital would be handicapped in entering business, and many struggling merchants of ability would be unable to continue if credit arrangements were to cease and cash were demanded for all purchases." Beckman, "*Credit And Collections In Theory And Practice*" (1938) pp. 59-60.

> "Commercial credit affects the output of goods by opening business opportunities to men who could not otherwise take advantage of them because of lack of funds." Slichter, "*Modern Economic Society*" (1931), p. 243.

And the direct relation between extension of credit and the availability of ready legal means of collection cannot be questioned.

> "The dependence of the credit system upon the existing legal system has often been pointed out. After all, as Commons indicates, in a credit economy there occurs 'transfer of goods and services for a mere promise to pay a price, whose reality is none other than confidence in expected behavior of citizens, judges and legislatures.' First is established the enforceability of contracts, without which no credit man would give second thought to an applicant for credit." Prendergast & Steiner, "*Credit And Its Uses*" (1931), p. 10.

As already stated, if a suit to collect the price of goods sold can be turned by a general plea of violation of the Patman Act into a comprehensive, complicated, and costly antitrust action—or throw the burden of disproving violation on the seller—the extension of mercantile credit normal to business transactions will be wholly changed. It must no longer turn on the character, resources, or prospects of the buyer. But it must instead be measured, if at all, against the cost of meeting the kind of defense here sought to be recognized.

We respectfully submit that no more drastic or far reaching change in the structure of business operations could be caused by such a reversal of the settled decisions of this Court. And no more direct method of cur-

tailing the extension of credit could be suggested.[1] For not only do these need credit more than the larger, established businesses, but by the same token they would be considered the buyers who might because of inability to pay make the kind of defense here requested. Thus the impact of allowing the defense would be on the very group whose welfare Bruce professes to advance in seeking to avoid payment for what it has purchased.

To summarize: Long standing decisions of this Court establish that only where illegality under the Sherman Act can be found in the contract or transaction sued upon, will a plaintiff be denied all relief on the ground that violation makes the contract void. The unlawful price discrimination prohibitions, added to the Clayton Act in 1936 by the Robinson-Patman Act, apply only to the relationship between two or more sales to two or more buyers. The Act does not make illegal any single sales transaction standing by itself. It measures violation against the finding of discrimination having specified effects. On its text, the Act cannot make any sale to a buyer at a higher discriminatory price legally void. Thus passing the generality of Bruce's pleas in this case, even a complete showing of an unlawful price discrimination under the Robinson-Patman Act cannot be

[1] If Bruce is taken at its word to be a small enterprise, no better example could be offered where the development of a business is dependent on mercantile credit. For the development of Bruce's business was measurably made possible by the extension of credit to it. This is illustrated by Bruce's letter of October 30, 1941 (R. 339-40) in which he makes it clear that in preparing his financial statement he desires to show his outstanding indebtedness to American as a long term rather than a current liability.

a bar to a suit to recover the price of goods sold to one buyer at a higher price. So to hold would do more than provide a remedy not given by Congress in the Patman Act. It would impose a penalty wholly unrelated to any damage to any buyer. More important, thus to change the ordinary law suit for the price of goods into an inverted, complicated, and costly antitrust proceeding, would seriously curtail the giving of commercial credit by seller to buyer. This departure from settled law would have its impact primarily upon the smaller enterprises which the Act was intended to protect. These reasons alone require a denial of the defense here argued.

II. THE CONTENTIONS PRESENTED IN THE BRIEF FILED AMICUS CURIAE BY THE UNITED STATES ARE WITHOUT VALIDITY.

The *amicus* brief filed by the Department of Justice, after asserting that the Robinson-Patman Act is an integral part of the antitrust laws, broadly asserts that all defenses of illegality recognized as proper under the other antitrust laws carry over and are equally appropriate under the Robinson-Patman Act. It is true that where, as in the Sherman Act, offenses known to the common law are codified by statute and new remedies, either public or private, are provided by that statute, the existing remedies at common law are not thereby destroyed. But it is only in a technical sense that the Robinson-Patman Act may be said to be a part of the antitrust laws. The offenses which it defines and proscribes are new offenses created by it, and in defining these offenses it prescribes the specific remedy available to an injured private party, viz. a treble damage suit. As shown in our main brief, Congress, in considering this statute, was unwilling even to permit the recovery of price differences by an injured party. (Main

Brief, pp. 12-13) It would seem that the doctrine of the *Wilder* case, *supra*, is here directly in point.*

In support of its contention that Bruce's contract of sale is an illegal sales agreement, the *amicus* brief states that "Essentially what is prohibited by each section [of the statute] is sale of goods to different purchasers at different prices." This is erroneous and misleading. As repeatedly pointed out above, it is only sales at different prices under certain specified circumstances, and which produce certain undesirable results, which are prohibited. The ingenious argument is advanced that the high price and the low price are equally illegal, because they are part of the "offense" prohibited by the statute. The use of this word "offense" leads into casuistry. It is apparently used to convey the impression that it is synonymous with criminal conspiracy or criminal violation, every step in which might be considered illegal. But a reading of the statute demonstrates that this is not the case. The abuse aimed at in paragraph 2(a), under which this case arises, is the creation of a competitive disadvantage resulting from charging different prices under substantially the same conditions. The paragraph prohibits discrimination but contains no criminal provision. Nowhere does the

* The gravamen of the violation in paragraph 2(a) is, as stated, the creation of a substantial competitive disadvantage. The cases cited by the Government (*Amicus* brief, page 13, footnote 10) arose under Setcion 2(c) relating to illegal brokerage, commissions, etc. The provisions of that section are substantially different from those in paragraph 2(a). The effect on competition is not an element of violation under Section 2(c). That section specifically makes punishable the granting or receiving of unlawful brokerage or commissions, etc. It seems misleading to cite these cases as opposed to the authorities cited by us, such as the *Progress Corporation* and the *Gross Brothers* cases.

statute intimate that the charging of the higher price is in and of itself an illegal act, and it is significant that under Section 3, which defines criminal violations, it is only sales at the *lower* price that are declared unlawful. This, we think, shows that the transactions of sale here involved cannot be treated as an "offense" every transaction related to which is illegal.

Even if Bruce had shown or could show on this record that the giving of a lower price to a favored competitor had produced either one of the two effects required by the statute, nevertheless Bruce's contract would not be illegal, and any illegality involved in the contract for the more favored competitor could not be pleaded as a bar to a suit on Bruce's contract. This is the answer to the Government's assertion that a sale at the higher price being, like a sale at the lower price, a part of an offense, any court giving judgment for the higher price is aiding in the commission of the offense. The question framed by the Government—"Is this a suit to enforce a contract which is illegal under the Robinson-Patman Act?"—must, therefore, be answered "No". This analysis also demonstrates the fallacy inherent in the Government's closing vague suggestion that possibly a recovery might be had on a *quantum meruit* basis. If the dealings with Bruce were of an illegal character as part of an "offense", under the Government's own argument there could be no recovery at all. But no such legal issue is tendered in the pleadings or presented by the record in this case.

Further, it seems also significant that the Government, although discussing some of the most important policy considerations, makes no reference to the record in this case and entirely ignores the effect on commercial credit of a reversal of the judgment below.

III. THE COURT BELOW PROPERLY RULED THAT ON THE FACTS DEVELOPED IN THE PRETRIAL PROCEDURE THE SUMMARY ENTRY OF JUDGMENT PURSUANT TO STATE PRACTICE MUST BE AFFIRMED.

If this Court should now hold that a buyer sued for the price may defend by showing a violation of the Robinson-Patman Act in sales to others—on the theory that the sale to him was void and he need not pay for the goods—it is still necessary in the case at bar to determine whether the court below erred in concluding that "under the facts submitted" Bruce had not made out this defense.

It will be recalled that after testimony occupying over 500 pages of this printed record, and a large number of exhibits, had been received, and both sides closed the pre-trial proceeding, the trial judge ruled that as a matter of law, the defense was not available. (R. 582.) On appeal, the Supreme Court of Florida first concluded that this was wrong. (In so doing, it missed the key point that the Robinson-Patman Act, unlike the Sherman Act, does not make illegal any particular sale, but that illegality can be found only by comparing a series of sales and determining their effect as a group. (See R. 599.))

American then asked for a rehearing on two grounds. The first was that the Supreme Court of Florida was wrong on the law—"discrimination is not a contract at all, but is a general course of business affecting the relation between the seller and all its customers". (R. 604.) The second ground was this: Even if the defense were available, on the evidence taken in the pretrial proceeding, the Supreme Court of Florida could, pursuant to State practice, "consider the entire rec-

ord" and affirm the judgment.[25] In its petition American pointed to the evidence—the testimony of Bruce and his witnesses, the exhibits, etc.—and contended that no violation had been made out. Put another way, it argued that Bruce had not shown that it could support its vague, general pleas even if legally they could be interposed.

This the Supreme Court of Florida did. After holding the case under advisement from November 17, 1944 to April 17, 1945, the court concluded in a *per curiam* decision that

> "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed." (R. 621)[26]

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[25] American urged that

> "The pleas, (wherein Appellant [Bruce] charged Appellee [American] with discriminating in price against it in favor of others, while averring simultaneously that such prices and terms of sale were unknown to it, Record 52); the defenses abandoned during the progress of the cause on appeal (Record 95; Appellee's Brief, pages 5, 42); and the quality and nature of the evidence it offered, demonstrate to a moral certainty the frivolous and baseless nature of the defenses here. . . ." (R. 616.)

[26] Bruce seeks to confuse this decision by arguing that only 3 out of 7 judges took this view. (Pet. Brief, p. 16). This was largely the basis for its petition for rehearing in this Court. (Petition for Rehearing, pp. 6-7). Even though its relevance is difficult to see, this is incorrect. The record shows clearly (R. 621) that Judge Sebring concurred in the *per curiam* on the facts, and also separately stated his further opinion that the defense was not available as a matter of law. Under Florida practice this is the regular manner of indicating both a general and special concurrence.

Bruce assails this judgment on two bases. The first is that the Florida State practice results in "serious departures from the ordinary requirements of proper process in a State court." This, we think is a catchall due process objection first thought of in this Court. Its complete lack of foundation is fully dealt with in our main brief, pp. 31-33, and need not be again considered.

Bruce's second ground is that the Florida Supreme Court was wrong in concluding that, on what Bruce demonstrated it would be able to prove, it could not make out its charges. In substance, it asks this Court to review the entire record and exhibits on this issue. It might be observed, however, that on another defense which collapsed Bruce does not claim denial of due process. It pleaded a "conditional delivery" of the notes. On this the trial court found that Bruce could not make proof (R. 581-82) and the defense was abandoned. (R. 600.)

Of course, apart from constitutional issues, ordinarily it is not the function of this Court to review such fact questions determined by State courts pursuant to State procedure. But since Bruce urges that it be done, we briefly examine what Bruce showed it could prove on its charges—what the court below found in this record and the accompanying exhibits.[27]

In the first place, there is in this case the fundamental defect that Bruce cannot tie up any of the notes to spe-

[27] On oral argument, counsel for Bruce stated that plaintiff's exhibits 2 to 14, inclusive, were never received in evidence. These exhibits were in proof of the legality of the quantity discounts. By inadvertence they are not printed in the record, but they were transmitted to this Court by the Supreme Court of Florida and are on file here. Filed with these exhibits in this Court is an order signed by the Circuit Court Judge stating that they had been received in evidence. They were treated as being in evidence by the Hillsborough County Court, the Florida Supreme Court, and both parties to this litigation until the oral argument in this Court.

cific purchases by it. The renewal notes are void, it claims, because the original sales were void. But which sales transactions affect which notes it cannot specify. (See Respondent's Brief, pp. 5-6, 34-35, 37 and record references.) Nor can it—as American pointed out to the court below (R. 614)—even relate the notes in point of time to particular sales. No proof was available or suggested on the essential question as to what part of the indebtedness arose before or after there occurred the sales to others which Bruce says gave rise to the discrimination. (This defect is examined in detail in our main brief, pp. 34-38.)

Turning to its charges of discrimination, several collapsed beyond challenge and some were abandoned by Bruce. On the charge of discrimination in making truck deliveries (*e.g.*, Third Plea, R. 5), Bruce admitted in his own testimony that there was no discrimination (R. 78), and his counsel waived this charge on argument below. (Bruce Reply Brief, Florida Supreme Court, p. 12.) As to alleged discrimination on closing machines (Second Plea, R. 5; Seventh Plea, R. 9; Second Plea [second case], R. 42-43), Bruce again had no proof (R. 72-73), and once again his counsel waived these charges on argument. (Reply Brief in Florida Supreme Court, p. 12.)[28] Thus, these two charges of discrimination can be eliminated.

Next there is the only remaining definite charge. This is that American sold cans cheaper in Texas than in Florida. As pointed out to the court below (R. 614),

[28] In view of this record, the attempted reintroduction of these same charges in this Court, without mention of abandonment below, is difficult to explain. See Petitioner's Brief, pp. 29-30, items (b) and (e). The abandoned charges are again repeated in the Reply Brief, p. 14.

and from the uncontradicted facts and admissions of record fully reviewed in our main brief, pp. 33-37, this issue likewise foundered for lack of proof. The two different sizes of cans concerned were not the same and one was considerably more expensive to produce. But controlling on this issue was Bruce's admission that its competitor in Texas paid more in fact to get his cans than did Bruce. (See Resp. Brief, p. 35 and record references.)

This left only Bruce's general charge that in selling all sizes and types of packers food cans to others throughout the United States American sold them at lower prices. Bruce's position is simply that once it showed a general difference in price, reflected in a quantity discount on all containers of every type and size for the packing of food, this was *prima facie* evidence of illegality in every transaction—and enough to make every transaction void. This comes down to saying that once a buyer, sued for the price, shows that the seller had a uniform discount schedule—and shows nothing else—he has made out a case of violation of the Act.

It is here that Bruce's failure to relate the notes in suit to any particular sales transactions at any specific times made the summary judgment the only possible action that the lower court could take. For only by tying the notes to particular sales of cans which were at the same time sold to other customers packing competing products can Bruce bring any transactions within the Act.[29] Bruce asserts simply that other food

[29] Just how thin Bruce's position remains, can be gathered from its Reply Brief. In urging that it need not relate sales to it to any other sales, or specify in some way what is required by the Act, Bruce argues that, "Cans are a miscellaneous category of various sorts and sizes contrived to serve the *same or different purposes*. There are cans for corn, peas, asparagus, string-beans, to-

packers got a discount and that it did not during the six-year period. The record makes it clear that none of the customers receiving discounts purchased the smaller special juice cans during the period in which the indebtedness arose. (See Main Brief, pp. 5, 36-38.) And it was with respect to these small cans that the testimony proffered in the pre-trial proceeding principally dealt. Apart from this, Bruce made it clear that it could not relate any of the indebtedness represented by the notes—which constituted only a fraction of the total amount of sales to it over the six years—to purchases in any year of any particular type and size of container. The most that could be said was that the indebtedness represented can purchases in a "blanket way" over the entire, or possibly some part, of the period. (R. 373-374.) Thus there was a complete failure to establish concurrent sales of like commodities to others at discriminatory prices.

Even apart from this failure to establish two different sales of the same commodity at the same time, Bruce also failed to offer any proof of competitive injury. It did not attempt to demonstrate that the pineapple juice packed in Hawaii or the vegetable juice packed in California or Indiana was in competition with its products, that such products were sold at lower prices, or that

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matoes, pineapples, peaches, *and a great array of products, sold in diverse markets.* (R. 213-14.) The one thing in common is that this discount, operating in disregard to type and size of product, applied to all sales of cans whether of grocery or smaller size, and *regardless of what purpose for which used.*" *Reply Brief*, p. 15. If this attempt to rewrite the Act is accepted, a sale of a can for lubricating oil or insecticide at a lower price than a sanitary can sold to Bruce is *prima facie* illegal regardless of the competitive effect which Congress specified. Even more, Bruce's position is that merely showing such price differences is enough *prima facie* to render all of the sales *void*.

Bruce had been affected in any way. Even assuming *arguendo* that there was some price discrimination in favor of buyers engaged in the packing and selling of grapefruit juice in Florida, Bruce must show some effect on its operations. At the least there must be proffer of proof that the competing discount-receiving packers sold their products at lower prices, that in some market at some time Bruce was competitively injured, and that such injury was substantial. No evidence on these requisite points was developed in the pretrial proceedings. Without such proof, no violation of the Act could be established.[30]

Confronted with this failure to establish a *prima facie* case on its defense—as found by the court below—Bruce here attempts to argue that it is enough for it to establish differences in price and that the burden was on American to disprove a violation of the Act. The technique is to make a general over-all assault on American's discount schedule. For to make a complete picture in the pre-trial proceeding, American introduced comprehensive accounting schedules justifying its schedule. It offered to "make the records of the company available to defendant's [Bruce's] auditors

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[30] Bruce attempts to make a point of the refusal to permit the production of detailed confidential information. The lack of substance in this claim, and the fact that all relevant evidence was introduced, have been shown in our main brief, p. 41. But it must be understood that none of these questions related in any way to what Bruce had to prove. American's detailed invoices were irrelevant to the failure of Bruce to offer any data whatever to establish *prima facie* that effect on competition requisite under the Act. This red herring arising out of an unsuccessful attempt by Bruce's counsel at a fishing expedition into American's detailed records, cannot obscure Bruce's failure to make out a violation.

for the purpose of examining the details" (R. 238) in these schedules. This Bruce's counsel never pursued.

The validity of the showing made—assuming that absent any *prima facie* showing by Bruce of a violation, American had to do anything further—has been fully demonstrated in our main brief, pp. 42-47. It suffices here to point out that Bruce's position reduces itself to the assertion that under the Robinson-Patman Act a seller may not for discount purposes group his customers but must in effect establish a separate discount basis for each separate customer.

Nowhere in this Court or below does Bruce deal with what the exhibits showed as to differences in the cost of sales. Its position is that any classification of customers by volume purchased—without reference to demonstrated savings—is illegal. Bruce insists that the statutory reference to "only due allowance" for differences in sales cost relates, in Bruce's words, only "to sales to *particular* customers and *not* to *classes of customers.*" *Reply Brief*, p. 18.[31] Since Bruce insisted the classification was illegal, its final position is that, "Therefore, *no facts* could be introduced by respondent to justify such a system." *Reply Brief*, p. 17. Presumably, having shown a mere price difference, but no relation to specific sales to others of any particular cans sold to it, and no competitive effect, Bruce on this basis sought to prove that the sales to it were legally *void* and it need not pay for what it has bought.

This is not the law; the grouping of customers for discount purposes has been repeatedly approved by the

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[31] Hence Bruce's reluctance to deal with the exhibits—which it did not challenge, and did not avail itself of the opportunity to check—and its insistence on its right to examine individual costs of sale by American to individual customers.

Federal Trade Commission; and, as we have further shown, even if it were, the only justification item to which Bruce objected did not affect the result as to it. (See discussion and analysis of cost exhibits in Respondent's Brief, pp. 45-46.)

Consequently, if this Court should hold the defense available, and if it desires to review in detail the lengthy record and accompanying exhibits, we submit that on the facts developed in the pretrial proceedings the lower court, pursuant to the established Florida State practice, was clearly right in concluding that the defense could not be established in this case. On any theory the notes sued on were void only if the original sales were void, and Bruce could not tie up any note with any sale to it at any particular time in the six-year period. Two of Bruce's charges of discrimination —relating to truck deliveries and closing machines— collapsed for want of any proof and were withdrawn below (even though now sought to be here revived). The detailed and unchallenged data on small cans disposed of any basis for a claim of discrimination. This left only a generalized assault on an over-all quantity discount as to which no showing was made of any available proof of competitive effect. And in addition the unchallenged facts in American's accounting data showed full cost justification.

CONCLUSION

We submit, therefore, that the judgment of the lower court must be affirmed.

Respectfully submitted,

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